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SUPREME COURT U.S.

IN THE SUPREME COURT FOR THE UNITED STATES

October Term, 1983

ROBERT GLENN COE,

Petitioner

vs.

STATE OF TENNESSEE,

Respondent

No. 83-5705

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF STATE OF TENNESSEE

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IN THE SUPREME COURT FOR THE UNITED STATES
October Term, 1983

ROBERT GLENN COE, Petitioner	)	
vs.	)	No. 83-
STATE OF TENNESSEE, Respondent	)	

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF STATE OF TENNESSEE

Petitioner, Robert Glenn Coe prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee in affirming his sentence of death for murder.

OPINION BELOW

The opinion of the Supreme Court of the State of Tennessee affirming the death penalty is officially reported at 655 S.W.2d 903 (Tenn. 1983) and is attached as Exhibit A.

JURISDICTION

The judgment of the Supreme Court of the State of Tennessee was entered on the 27th day of June, 1983. A timely petition for rehearing was filed and said petition for rehearing was denied on the 6th day of September, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

In Duren vs. Missouri, 439 U.S. 357, 99 S. Ct. 664, 58 L.Ed.2d 579 (1979) this court set forth the standards required to establish a prima facia violation of the fair cross section requirement for jury composition. The court ruled that only a jury composed of a fair cross section of the community

constituted the impartial jury required by the Sixth Amendment to the Constitution of the United States.

In Gregg vs. Georgia, 428 U.S. 153 (1976) and Godfrey vs. Georgia, 64 L.Ed.2d 398 (1980) this Court stated that the constitutional concerns expressed in Furman vs. Georgia, 408 U.S. 238 (1972) which resulted in the invalidation of the death penalty, could be met only by a carefully drafted statute that insures that the sentencing authority's discretion is suitably directed and limited so as to minimize the risk of arbitrary and capricious imposition of the death sentence. The court required constitutional safeguards to insure against a jury's arbitrary and capricious infliction of the death sentence in violation of the Eighth Amendment. This court has recently granted certiorari in Pulley vs. Harris, No. 82-295 to determine what standards of proportionality review are required by Gregg and Godfrey.

This case raises the questions of whether a Tennessee jury selection statute and the Tennessee death penalty statute, though both capable of constitutional construction, have been interpreted and applied in such a way that the safeguards against an impartial jury and against random and arbitrary imposition of the death penalty are ineffective to meet the constitutional objections raised in Duren vs. Missouri and Furman vs. Georgia and its progeny. Specifically this case presents the following questions:

1. Whether the Petitioner was denied due process by the systematic exclusion of women from the grand jury pool and has standing to challenge the composition of the grand jury which indicted him.

2. Whether the Tennessee death penalty statute is unconstitutional as applied to the Petitioner due to the disproportionate sentence given the Petitioner and whether the Tennessee Supreme Court conducted the proper proportionality review of Petitioner's death sentence.

3. Whether the Petitioner was denied due process by the trial court's charge to the jury on premeditated murder after the trial court has informed counsel before a jury voir dire that premeditated murder would not be charged.

4. Whether the Petitioner was subjected to double jeopardy by his conviction of both felony murder and the underlying offense, which obviated the necessity for the proving of any additional elements for a conviction of first degree murder.

5. Whether the Petitioner was denied an impartial jury by the failure of the trial court to allow individual and sequestered voir dire despite the fact that the two previous change of venues had to be granted because an impartial jury could not be paneled and that over half the jury pool from which the trial jury was selected were excused for cause.

6. Whether the Petitioner was denied an impartial jury as a result of the prosecution's voir dire on the issue of insanity.

7. Whether the Petitioner was denied a fair trial by the playing to the jury of a tape of Petitioner's confession as a part of the prosecution's closing argument.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This cause involves the Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States, as set forth in Exhibit B.

2. This cause also involves the following statutes of the State of Tennessee as set forth in Exhibit C: T.C.A. §22-2-201, T.C.A. §22-2-302, T.C.A. §39-2-202(a), T.C.A. §39-2-203(1)(5)(6)(7), T.C.A. §39-2-205, T.C.A. §40-18-111, and Tennessee Rules of Criminal Procedure, No. 6(a), and Tennessee Constitution, Article 1, Section 10.

REASONS FOR GRANTING THE WRIT

This Court has recognized the unique and awesome nature of the State's power to determine whether a human life should be taken or spared. Because of the absolute and irreversible impact of this determination, this Court has mandated that the death penalty may be consitutionally imposed only under procedures that insure that the trial afforded to the Petitioner was fair and

conducted before an impartial jury and that the State's power to decree death is not wantonly and capriciously exercised.

Petitioner was denied the protection of both procedural safeguards declared to be constitutionally required. The jury which convicted the Petitioner did not represent a fair cross section of the community, it is prejudiced by inflammatory evidence and its sentence of death was grossly disproportionate to the sentences imposed in similar crimes and to similar defendants. Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated in these proceedings.

STATEMENT OF THE CASE

On December 11, 1979, Petitioner Robert Glenn Coe was indicted by the Weakley County grand jury for the offenses of first degree murder, aggravated rape and kidnapping of an eight year old child. Two motions for change of venue were granted and the trial began on February 10, 1981 in Shelby County, Tennessee. On February 26 and 27, 1981, a Shelby County Criminal Court jury found Petitioner Robert Glenn Coe guilty of murder in the first degree and of aggravated rape and kidnapping. On February 28, 1981, the Shelby County Criminal Court jury found certain statutory aggravating circumstances numbered in T.C.A. §39-2-203(i), (5), (6) and (7) to wit: the victim was under twelve years of age and the Defendant was over eighteen years of age; that the murder was especially heinous, atrocious and cruel and involved tortue; it was committed to avoid prosecution; and it was committed while the Defendant was engaged in committing and fleeing after committing aggravated rape and aggravated kidnapping. No mitigating circumstances sufficiently material to outweigh the statutory aggravating circumstances were found and the Petitioner's penalty for the first degree murder conviction was set at death. His penalty on the other two offenses was set at life imprisonment.

A motion for new trial was timely filed and was subsequently overruled on April 10, 1981. New counsel was appointed to appeal the case upon direct appeal to the Tennessee Supreme Court on April 27, 1981.

On May 11, 1981, the trial judge filed with the Supreme Court of Tennessee a statement setting forth sentencing information on the Petition including aggravating and mitigating factors. On June 27, 1983, the Tennessee Supreme Court affirmed Petitioner's conviction on the three offenses and the sentences imposed including the sentence of death.

A timely petition for rehearing was filed and subsequently on September 6, 1983, petition was overruled.

Present counsel was substituted for appellate counsel on September 15, 1983 and upon Petitioner's motion, the sentence of death was stayed pending application for petition of certiorari to the United States Supreme Court effective September 15, 1983. This petition for certiorari is timely filed.

STATEMENT OF THE FACTS

On December 11, 1979, Petitioner Robert Glenn Coe was indicted by the Weakley County grand jury for the offenses of first degree murder, aggravated rape and kidnapping in the September, 1979 death of an eight year old child. Two motions for change of venue were granted and the trial began on February 10, 1981 in Shelby County, Tennessee.

Prior to trial, Petitioner through counsel challenged the composition of the grand jury which indicted him. The Petitioner questioned the constitionality of the statutory obligation of the jury commissioners under T.C.A. §22-2-302, to select "a list of names of upright and intelligent persons known for their integrity, fair character and sound judgment who are otherwise legally qualified to serve as jurors." Petitioner alleged that in practice, women, blacks and younger qualified persons were underrepresented.

Extensive proof was presented concerning the selection procedures for the Weakley County grand jury. Introduced into evidence was a complete list of names for the jury pools for the grand jury which indicted Petitioner Coe and for the preceding three grand juries. The population of Weakley County according to the 1970 census was 28,827 of which 14,177 were male and 14,650 were female.

In a procedure similar to that accepted by the Tennessee Court of Criminal Appeals in the case of State vs. Nelson, 603 S.W.2d 158 (Tenn. Crim. App. 1980) to break down the number of males and females on the jury pools the jury pools were broken down into statistical categories. This information was compiled into an exhibit the accuracy of which was accepted by the prosecution. (Vol. 2, p. 211, Ex. 6) This exhibit showed that the percentage of the Weakley County population eligible for inclusion in the grand jury pool which indicted Petitioner Coe was comprised of 70.41% male and 29.59% female. The preceding grand jury pool contained a percentage of 58% male and 42% female, the third most recent grand jury pool contained a percentage of 62.23% male and 37.77% female. The fourth most recent grand jury pool contained percentages of 77.65% male and 22.35% female.

The jury commissioners were called to testify as to the method they used in selecting members of the grand jury pool. Each testified that they picked the people that they knew and that they made some attempt to insure that sufficient number of blacks, younger persons and women were included in the grand jury pool.

Statistical evidence was introduced to the effect that the probability of having just 200 women on the grand jury pool out of 676 randomly selected individuals assuming the population of men and women were approximately 50/50 is less than one out of a million. (Schwartz Affidavit, p. 3)

The trial court denied Petitioner's challenge to the composition of the grand jury. Upon appeal, the Tennessee Supreme Court ruled that Petitioner, a white male, had no standing to challenge the composition of the grand jury claiming underrepresentation of females. (State vs. Coe, 655 S.W.2d at 910)

Because of the extensive pretrial publicity surrounding this case, two changes of venue were sought and granted before this matter was brought to trial. Although the offense occurred in Weakley County, an impartial jury could not be selected and a change of jury was granted to Obion County. There also, because of the extensive area-wide publicity, an impartial jury could not be selected. Finally, the case was transferred to Shelby County (Memphis) where it was tried beginning February 10, 1981.

Prior to conducting the voir dire of the jury pool, the trial judge inquired as to whether the one count murder indictment was both a common law or premeditated murder and a felony murder indictment (Vol. 2, p. 6). The prosecutor responded:

> Felony murder. I believe we reached that decision at the last meeting we had with Judge Faquin [the trial judge in Obion County] and that issue was raised and we pursued it to the point of felony murder indictment, however, murder in the perpetration of a felony, being aggravated kidnapping or aggravated rape.
>
> (Vol. 2, p. 6)

The trial judge and the prosecutor then mentioned that under the statute the indictment could be read to be both common law (premeditated) murder and

felony murder. Defense counsel then reiterated the request to know exactly upon which ground the state would proceed. The district attorney then responded, "Still, I state to the Court that felony murder would be the proceedings by the State." (Vol. 2, pp. 7-8) The following then took place:

> COURT: All right, let's have it clearly understood. The Court will proceed that there is a one count indictment charging this defendant, Robert Glenn Coe, with the charge of the felony murder, of murder in the perpetration or attempt to perpetrate aggravated rape.
>
> D.A. HAYES: That is correct.
>
> COURT: I will not charge the common law count dealing with premeditation, etc. Only the one count, felony murder. Okay?
>
> D.A. HAYES: That is correct.
>
> COURT: Does everybody understand? All right, so much for that.
>
> (Vol. 2, p. 8)

Neither the defense nor the prosecution attempted to qualify the jury on the elements of premeditated murder or on the lesser included offense of second degree murder. The case was tried before the jury as a felony murder case until the defense objected to the introduction of certain photographs of the deceased taken at the scene. Over objection, the trial judge allowed the photographs for the ostensible purpose of showing the premeditation. (Vol. 22, pp. 16-17)

At the conclusion of the State's proof the trial judge stated that he would not be bound by any state election and that he would charge the element of premeditation in first degree murder. (Vol. 22, pp. 17-18 and Vol. 30, pp. 24-88)

During voir dire, the prosecutor explained to the jury pool that the Defendant was charged with murder in the perpetration of rape, and with rape and kidnapping of a child under thirteen. (Vol. 2, p. 52) After the definition of murder and insanity, prosecution explained that the proof would show that the deceased was only eight years of age and addressed the prospective jurors

by asking if they thought one harming an eight year old child would have to be insane to do a thing like that. (Vol. 2, p. 96)

Prospective juror Delk stated that such a person may not be insane but something is probably wrong with them. (Vol. 2, p. 99) The prosecutor then asked some more specific questions of prospective juror Delk by stating; if, knowing the charges and proof outlined would she be included to think this defendant was insane? Her response was "yes sir." (Vol. 2, p. 109) She then stated she had a preconceived notion that people who would harm a small eight year old child are insane or have some mental problems. Although this opinion could probably be changed by the proof and she did say that she would judge the evidence of sanity and the Defendant's evidence of insanity fairly and impartially and that her opinion was not concrete but would require proof to change her mind, the juror was excused over defense objection for cause. (Vol. 2, pp. 110-113) Prospective juror Bynum was excused for cause over defense objection when he responded in the affirmative he had an opinion that a person committing an act of "seriousness" against an eight year old girl must be insane or "have a severe mental problem" or "be crazy." (Vol. 2, pp. 283-284)

Other jurors were questioned concerning their commitment as to whether or not they would think that, knowing the facts, that "something was wrong with him" or that he had to be "crazy." (Vol. 8, p. 342, Vol. 9, p. 502, Vol. 17, p. 963)

The Defendant exercised all of his fifteen preemptory challenges. (Vol. 17, p. 912)

At trial Petitioner asserted the defense of insanity and the mitigating factor of insanity. In support of Petitioner's claim of insanity, Collective Exhibit 67 was used to show the history of Petitioner's childhood and early psychological evaluations.

Petitioner was raised with two sisters. His mother and father had a poor relationship. His father repeatedly had intercourse with his older sister. He was often beaten by his father unmercifully for nothing more than the father's satisfaction. He went to school through the seventh grade after

which he dropped out. He did very poorly in school, failing at least once and perhaps more. (Ex. 67)

Petitioner was first examined by a psychologist in Florida after arrest for rape and was found to be laboring under such a defect a reason that he was unable to know or appreciate the wrongfulness of his act. Petitioner showed a marked inability to think clearly and concentrate. He manifested marked anger and hostility which was primarily internalized. He manifested borderline intelligence. He manifested aspects of schizoid personality but was not blatantly psychotic. He did have the potential to become blatantly psychotic. (Dr. Wald 2/20/75, 1st Report; Ex. 67; Vol. 23, pp. 1849-1853)

Another examination in Florida by psychologist Dr. J. R. Lombrillo found Petitioner was suffering from a psychiatric illness and was not able to understand completely the quality of the act with which he was charged or whether he was doing wrong. (Lombillo 2/26/75 Report; 2nd Report; Ex. 67, Vol. 23, pp. 1854-1956)

Petitioner was committed to the Florida State Hospital on February 25, 1977. In its report (Ex. 67), dated June 5, 1975 it noted that Petitioner appeared to enjoy shocking the group in group therapy. However, he did not appear psychotic and appeared to be functioning within the dull normal range of intelligence. He best fit the category of personality disorder of an explosive and antisocial type with general underlying hostility and aggressiveness toward others that could make him potentially dangerous. He received medication twice daily.

The staff at the Florida State Hospital concluded that he was competent to stand trial (for the Florida rape charge) but noted long drug abuse and stated that if he was released he should be followed up in a local mental health center for drug abuse. Although treated with medication in the hospital, it was not considered necessary for him to continue the medication. (Ex. 67, 3rd Report of Florida State Hospital) However, both treating psychiatrists, Dr. Wald and Dr. Lombrillo, strongly opposed his release.

Petitioner was diagnosed by Dr. Lombillo at the Florida State Hospital on September 23, 1975 as (1) acute schizophrenic reaction in remission, (2) chronic schizophrenia, mild to moderate and (3) sexual deviation. It concluded that Coe still had a mental disorder of lack of impulse control and would be liable to commit the offense (rape) again and again unless he could receive appropriate care to learn constructive alternatives to deal with his sexual impulses. (4th Report; Ex. 67)

He further stated that the then 19 year old was still dangerous and recommended that he be transferred to the South Florida State Hospital for treatment as a mentally disordered sex offender. (5th Report, Ex. 67)

The next Florida State Hospital report, in April of 1976, states that Petitioner plead guilty to a lesser included offense of assault and was re-committed to the hospital on October 23, 1975 as a sexual offender. It noted the treating psychiatrist's recommendation of continued hospitalization and diagnosis of acute schizophrenic reaction in remission, chronic schizophrenia and sexual deviation. It noted mixed progress. At times Petitioner was sincere and at other times flippant. He had become violent. He still could not control his impulses. This time continued hospitalization was recommended. (6th Report; Ex. 67)

The next report from the State Hospital related that he had exposed himself to a nurse on May 21, 1976 and that the staff had concluded in its evaluation on June 1, 1976 that he should continue inpatient treatment. (7th Report; Ex. 67)

The August 10, 1976 hospital staff meeting again concluded that Petitioner had continued to exhibit himself on many occasions and recommended alternative disposition. (8th Report; Ex. 67)

Dr. Wald stated, on September 24, 1976, that he was impressed with the inability of Petitioner to control his behavior in the hospital even though he knew it would adversely affect his release. He agreed that Petitioner could not function effectively as a member of society and suggested Petitioner's confinement continue for at least one to two years. (9th Report; Ex. 67)

Dr. Lombillo stated in a September 30, 1976 letter that Petitioner, then 20 years old, had a thought process which was still characterized by blocking, which was a defense to Petitioner's emerging and uncontrollable aggressive impulses and all tests indicated poor to non-existence control over these feelings. Petitioner should be in a unit where severe psychopathology is treated. Petitioner has a latent type schizoprenia, and antisocial personality disorder associated with sexual deviation. Without this extensive treatment, Petitioner must be considered a high risk for future violent and antisocial acts toward women. (10th Report; Ex. 67)

The Florida State Hospital notes that at the staff's March 25, 1977 conference Petitioner was still believed dangerous due to his poor impulse control, exhibitionish tendencies, poor heterosexual relationships, and poor social and communication skill. (11th Report; Ex. 67)

The final hospital report notes on pages 4 and 5 that at a staff meeting on August 26, 1977, it was concluded that in spite of Petitioner still exhibiting himself to female employees on several occasions, he was improved. His exhibitionist propensity was still present and it was doubtful that he would ever curb it. However, his family was willing to help and there was a program available for sexual deviation by Dr. Gene G. Able at Memphis, Tennessee. (12th Report, Ex. 67)

Dr. Wald's final letter was dated October 6, 1977. (Ex. 67) It concluded that Petitioner would not represent a significant menace to society if he continued to seek treatment, refrains from use of alcohol and drugs, obtains meaningful employment and has the support of family members. It also recommended that he be allowed to return to Memphis for outpatient treatment by Dr. Able. (13th Report; Ex. 67)

The final letter from Dr. Lombillo dated October 20, 1977 recommended the release of the then 21 year old Petitioner hopefully under supervision of the court for outpatient treatment. (14th Report, Ex. 67) However, Petitioner never saw Dr. Able. (Vol. 24, p. 1971; 15th Report, Ex. 67)

Edith Poor, cousin of Petitioner, testified that since Petitioner left Florida and returned to Tennessee he had been a heavy user of drugs including uppers, downers, marijuana, cocaine and LSD or acid. (Vol. 24, pp. 998-9)

Prior to trial on the Tennessee charges of aggravated rape, kidnapping and murder, Petitioner was examined by a private psychiatrist, Dr. David G. Cook, who testified at trial. (Vol. 22, pp. 1783-1786) He described Petitioner as quite aggitated and excitable with thought processes tangential at best. He could not carry on a decent conversation for more than a minute and usually not that long. He was hallucinatory. His history was quite changable. His childhood was very traumatic, deforming his development. The word catastrophic as describing Petitioner's childhood would be a gross understatement. (Id., 1786-7) In Dr. Cook's opinion Petitioner was schizophrenic when examined in the latter part of May and early June, 1980. (Id., 1786) Dr. Cook was of the opinion that Coe was insane at the time of the act under the Graham decision if he had been taking LSD and Hashish at that time. (Id., 1791)

Dr. Cook noted that Petitioner has been arrested a multitude of times for exhibitionism. He was of the opinion that Petitioner's paranoid schizophrenic condition was drug mobilized. (Id., 1799) However, because of his upbringing he believed that he could not have come out of the particular environment on which he was raised without being psychotic even if he had never taken drugs. (Id., 1790)

On February 26 and 27, 1981, a Shelby County Criminal Court jury found Petitioner guilty of murder in the first degree and of aggravated rape and kidnapping. On February 28, 1981, the Shelby County Criminal Court jury found certain statutory aggravating circumstances numbered in T.C.A. §39-2-203(1)(5), (6) and (7) to wit: the victim was under twelve years of age and the Defendant was over eighteen years of age; that the murder was especially heinous, atrocious and cruel and involved torture; it was committed to avoid prosecution; and it was committed while the Defendant was engaged in committing and fleeing after committing aggravated rape and aggravated kidnapping. No mitigating circumstances sufficiently material to outweigh the statutory aggravating circumstances were found and the Petitioner's penalty for the first degree murder

conviction was set at death, his penalty on the other two offenses was set at life imprisonment.

A motion for new trial was timely filed and was subsequently overruled on April 10, 1981. New counsel was appointed to appeal the case upon direct appeal to the Tennessee Supreme Court on April 27, 1981.

On May 11, 1981, the trial judge filed with the Supreme Court of Tennessee a statement setting forth sentencing information on the Petitioner including aggravating and mitigating factors. On June 27, 1983, the Tennessee Supreme Court affirmed Petitioner's conviction on the three offenses and the sentences imposed including the sentence of death.

A timely petition for rehearing was filed and subsequently on September 6, 1983, petition was overruled.

Present counsel was substituted for appellate counsel on September 15, 1983 and upon Petitioner's motion, the sentence of death was stayed pending application for petition of certiorari to the United States Supreme Court effective September 15, 1983.

I. PETITIONER WAS DENIED DUE PROCESS BY THE SYSTEMATIC EXCLUSION OF WOMEN FROM THE GRAND JURY POOL.

At trial Petitioner challenged the composition of the grand jury which indicted him. He presented evidence that the grand jury pool selected in August of 1979 (which indicted him) was composed of 29.6% women and over 70.4% men. The State did not challenge the accuracy of these figures. (Vol. 2, p. 221) The population of Weakley County eligible for jury service according to the 1970 census figures showed that of the persons of age eligible for jury service 59.8% were women and 49.2% were men. (Vol. 2, pp. 188-208; Ex. 6) Thus, there was an absolute disparity of 21.2%. If the pool had reflected a population eligible for service on the grand jury, there would have been almost twice as many women in the pool as there were. Three women and ten men served on the grand jury that indicted the Petitioner. Testimony was presented through the affidavit of David Schwartz, a statistician that probability of this disparity would occur "in less than one in a million times by chance, I'd say less than one in a million because this probability is so low that we literally run off the end of the table . . . in other words, the occurence of the sample is so unlikely by chance that its probability does not even occur on the table, it's clear off the end." (Schwartz Affidavit, p. 3)

Three preceding jury pools (covering the six years preceding the pool from which the grand jury which indicted the Petitioner was chosen) had as few as 22.35% women and averaged an underrepresentation of women of about 17%. The three preceding grand jury pools had female percentages of 42%, 37.77% and 22.35%. These statistics show that there has not been a fair cross section during those eight years and possibly even more. In fact, the testimony of Jury Commissioner Featherstone referred to a time when he picked persons for the jury pool "back before women had to serve . . ." (Vol. 2, p. 252)

The jury selection statute in Tennessee has been held not to be facially discriminatory. See State vs. Nelson, 603 S.W.2d 158 (Tenn. Crim. App. 1980). The procedure described in T.C.A. §22-2-201 requires that a board of three jury commissioners in each county are to meet at fixed times in order to:

> select, from the tax records and the permanent registration records of the county, or other available and reliable sources, a list of names of upright and intelligent persons known for their integrity, fair character and sound judgment who are otherwise legally qualified to serve as jurors from each district in the county and in proportion to the population of such district . . .

The testimony of the jury commissioners at trial disclosed that they chose jurors from voters registration lists and generally selected people that they knew or others knew that met the statutory criteria, divided their selection proportionately within the alphabet testifying they specifically sought females, blacks, and young voters in an amount proportionate to county population. The names on the jury list are then placed in a box from which names are summoned for jury service. T.C.A. §22-2-302(b) Jury selection for grand jury is made from the same list. Tenn. Rules Cr. Proc. 6(a).

Petitioner contends that he has met the three-part test set forth by this court in Duren vs. Missouri, 439 U.S. 357, 99 S. Ct. 664, 58 L.Ed.2d 579 (1979) as follows:

> In order to establish a prima facia violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representative of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to the systematic exclusion of the group for jury selection process.

The Tennessee Court of Criminal Appeals in State vs. Nelson, supra, recognized that jury commissioners in following the requirements of the Tennessee statute absent any finding of malicious intent to omit names, did systematically exclude a distinct class in the community which constituted a significant portion of the county population. In that case, members of the "Farm," a local commune, were excluded from the jury pool for the simple reason that jury commissioners did not know anyone on the commune. The court found, however, that the Farm did constitute a distinctive group in the community and that the representation of that group (none) was not fair and reasonable in relation to the number of such persons in the community. The third Duren, supra,

requirement that the group's underrepresentation be due to their systematic exclusion was found by the Tennessee Court of Criminal Appeals despite the affirmations of good faith in making the individual selections by the grand jury commissioners. The court stated that these affirmations of good faith were insufficient to dispel the prima facia case of systematic exclusion. The court then cited Alexander vs. Louisiana, 405 U.S. 625, 92 S. Ct. 1221, 31 L.Ed.2d 536 (1972) and other cases.

Petitioner's challenge to the grand jury composition in his case was based upon the Alexander vs. Louisiana rationale and fits precisely into the factual situation represented in State vs. Nelson, supra. Petitioner, a white male, sought to challenge the composition of the grand jury pool for its exclusion of females. The State contended and the Tennessee Supreme Court agreed (State vs. Coe, p. 910), that the Defendant lacked standing to challenge the grand jury composition on the basis that women were systematically excluded. The decision by the Tennessee Supreme Court is in direct contradiction with the recent Eleventh Circuit ruling in United States vs. Cross, No. 81-7738 (June 30, 1983) which held that a white male did have standing to challenge the underrepresentation of women and blacks on a grand jury. (See also, Gibson vs. Zant, 705 F.2d 1543 [11th Cir. 1983]). The racial composition of the Weakley County jury pool, though not raised before the Tennessee Supreme Court, is subject to severe questioning. See, Rose vs. Mitchell, 443 U.S. 545, 99 S. Ct. 2993 (1979). Petitioner contends that this court should grant certiorari to consider the conflict between the Federal Court of Appeals for the Eleventh Circuit and the Tennessee Supreme Court on this important issue of due process and the right to a fair trial provided for by the Fifth and Sixth Amendments of the United States Constitution.

II. THE TENNESSEE DEATH PENALTY ACT IS UNCONSTITUTIONAL, AS APPLIED IN THIS CASE, DUE TO THE DISPROPORTIONATE SENTENCE GIVEN PETITIONER AND FOR ALLOWING THE FREAKISH IMPOSITION OF DEATH.

This Court has recently granted certiorari in Pulley vs. Harris, No. 82-295 which presents the question of what type of proportionality review by state courts is required to meet the Gregg standard. Gregg vs. Georgia, 428 U.S. 153 (1976) provides that the death sentence must be examined to determine if it is excessive or disportionate to the penalty imposed in similar cases. T.C.A. §39-2-205 provides for automatic review of a death sentence by the Tennessee Supreme Court to determine, among others, if "the sentence of death is excessive or disportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." T.C.A. §39-2-205(c)(4) (Emphasis added) Tennessee Supreme Court in affirming Petitioner's sentence for death does not conduct the proportionality review mandated by both Gregg and the Tennessee statute. See State vs. Coe at p. 22.

There was ample proof presented at trial to show that the Petitioner has severe mental disorders. The proof also showed that the Petitioner spent two and one-half years confined to a mental institution. As of March 10, 1983 ninety trial judge reports had been filed in the Tennessee Supreme Court Clerk's Office. Eight of those ninety reports indicated that the defendants had some sort of personality disorder. Of the eight, only one was sentenced to die. State vs. Coe, p. 913 (See, State vs. Ronald Rickman, 615 S.W.2d 142 [Tenn. 1981]). None of those individuals had ever spent time in a mental institution.

All the experts testified that Coe is a sexual deviate. His sadistic father repeatedly beat Petitioner, obtained delight in making Petitioner watch his rape of Petitioner's sister and made Petitioner watch him masturbate. These are not isolated instances. They happened time and time again for years during Petitioner's impressionable childhood. (Vol. 24, pp. 1976-1992)

Before Petitioner's eighteenth birthday he was constantly smoking marijuana, sniffing paint and using LSD. (Vol. 24, pp. 1987-8)

When Petitioner was eighteen years old he was charged with assault to commit rape and murder and was committed to the Florida State Mental Hospital for this offense. (Ex. 67, 5th Report)

After two and a half years the hospital staff reported that it was doubtful the Petitioner, then twenty-one years old, could ever control his sexual deviateness. He was released on the recommendation that Petitioner receive continuing out-patient treatment. However, after his release Petitioner never again had psychiatric treatment. (Vol. 24, p. 1971, 15th Report, Ex. 67)

A proper proportionality review by the Tennessee Supreme Court would have disclosed that the extent of the personalty disorder in Petitioner's case was much more overwhelming and consuming that in the eight other cases where personality disorders were indicated. Additionally, no other individual in Tennessee who has faced a capital sentencing hearing has ever spent any time confined to a mental institution. Yet, of the eight defendants with some sort of personality disorder, seven were given life imprisonment. Under such circumstances, the imposition of the death penalty is "pregnant with discrimination" and "the Tennessee statute as applied to Petitioner permits the death penalty to be "wantonly" and "freakishly" imposed. Furman vs. Georgia, 408 U.S. 238 (1972).

Additionally, this Court should grant certiorari to determine if the proportionality review conducted by the Tennessee Supreme Court was constitutionally sufficient in light of the granting of certiorari in Pulley vs. Harris, No. 82-295.

III. THE PETITIONER WAS DENIED DUE PROCESS BY THE TRIAL COURT'S CHARGE TO THE JURY ON PREMEDITATED MURDER AFTER THE TRIAL COURT HAD INFORMED COUNSEL BEFORE JURY VOIR DIRE THAT PREMEDITATED MURDER WOULD NOT BE CHARGED.

Prior to conducting the voir dire on the prospective jurors, the trial judge inquired as to whether the one count murder indictment was both a common law premeditated murder indictment and a felony murder indictment. (Vol. 2, p. 6) Attorney General Hayes, the prosecutor, responded:

> Felony Murder. I believe we reached that decision in the last meeting that we had with Judge Faquin and that issue was raised and we proceeded from the point of felony murder indictment, murder and the perpetration of a felony, being aggravated kidnapping or aggravated rape.
>
> (Vol. 2, p. 6)

When the trial judge and the prosecutor observed that the indictment could be both common law (premeditated) murder and felony murder, defense counsel requested to know upon exactly which ground the State would proceed. The prosecutor responded, "Still, I state to the Court that felony murder would be the proceedings by the State." (Vol. 2, pp. 7-8)

The following dialogue then ensued:

> THE COURT: All right, let's have it clearly understood. The Court will proceed that there is a one count indictment charging this defendant, Robert Glenn Coe, with the charge of the felony murder, of murder in the perpetration or attempt to perpetrate aggravated rape.
>
> D.A. HAYES. That is correct.
>
> THE COURT: I will not charge the common law count dealing with premeditation, etc. Only the one count felony murder. Okay?
>
> D.A. HAYES: That is correct.
>
> THE COURT: Does everybody understand? All right. So much for that.
>
> (Vol. 2, p. 8)

Neither party attempted to qualify the jury on the elements of premeditated murder or the lesser included offense of second degree murder. The case was then tried as a felony murder case until the defense objected to

introduction of certain photographs of the deceased taken at the scene. The trial judge then allowed the photographs for the ostensible purpose of showing premeditation. (Vol. 22, pp. 16-70) At the conclusion of the State's proof the trial judge indicated that he was not bound by any state election to proceed only on the felony murder and that he might charge common law murder in the first degree; that it worried him not to "charge on something that was set forth in the indictment. Clearly, your common law on premeditation is set forth." (Vol. 22, pp. 17-18) The trial judge subsequently did charge on premeditated murder. (Vol. 30, pp. 24-88)

It is well settled in Tennessee that common law and felony murder are distinct and require distinctive treatment. Conley vs. State, 520 S.W.2d 358 (Tenn. Cr. App. 1974). The reliance by the defense counsel on the State's and the trial court's election to proceed on felony murder only resulted in defense counsel not conducting voir dire on the issue of premeditation. This denial of the right to voir dire constitutes prejudice to the Petitioner in that he was not allowed to examine the jury on this issue for possible bias and in the use of his preemptory challenges.

Further, the subsequent charge by the court on the issue of premeditation constitutes the denial of due process to Petitioner in that the notice of the use of premeditation which Petitioner received was not given at a meaningful time and in a meaningful manner. It was not given sufficiently in advance so that a reasonable opportunity to prepare on the issue of premeditation including voir dire on the subject could be afforded. (See, In Re: Oliver, 133 U.S. 257 (1947) and In Re: Gault, 387 U.S. 1 [1966]).

IV. PETITIONER WAS DENIED AN IMPARTIAL JURY AS A RESULT OF THE PROSECUTION'S VOIR DIRE ON THE ISSUE OF INSANITY.

This Court in Witherspoon vs. Illinois, 391 U.S. 510, 88 S.Ct. 1770, _____ L.Ed.2d _____ (1968) stated that:

> It is, of course, settled that a state may not entrust the determination of whether a man is innocent or guilty to a tribunal court "organized to convict." Fay vs. New York, 332 U.S. 261, 67 S. Ct. 1613, 91 L.Ed. 2043 and Tumey vs. Ohio, 237 U.S. 510, 47 S. Ct. 437, 71 L.Ed. 749.

Petitioner contends the voir dire of the jury by the prosecution organized the jury to return a verdict against Petitioner's defense of insanity and the mitigating factor of insanity. Such a jury violates Petitioner's rights to an impartial jury guaranteed by the Sixth Amendment to the United States Constitution.

During the voir dire by the prosecution, the prosecutor read the definition of murder and insanity. He then explained to the jury pool that the proof would show the deceased was only eight years old and then asked the pool if they thought that one "harming an eight year old child would have to be insane to do a thing like that." (Vol. 2, p. 96) Prospective juror Delk indicated that such a person may not be insane but something is probably wrong with them. (Vol. 2, p. 99) In specific questions to that juror, the prosecutor asked the juror if knowing the charges and proof outlined by him, she would be included to think the Defendant was insane and she said, "Yes sir." (Vol. 2, p. 109) She indicated she had a preconceived notion that people who would harm a small eight year old child are insane or have some mental problem. This opinion though probably could be changed by the proof. She said that she could judge both the evidence of insanity and a defendant's evidence of insanity fair and impartially. She said that her mind was not made up in concrete but it would require proof to change her mind. (Vol. 2, p. 111) This juror was excused for cause over defense objection. (Vol. 2, p. 113) Prospective juror Bynum was excused for cause after he stated that such a person must be insane or "have severe mental problems to cause harm to an eight year old child." (Vol. 2, pp. 283-284)

Petitioner contends prosecution's voir dire of the jury deprives the Petitioner of a jury which would consider all the relevant issues on both insanity defense and the mitigation phase of the penalty hearing. Such an examination by the prosecution allowed the prosecutor to find out a juror's reaction to certain evidence in advance of his presentation or to commit the juror to either consider favorable evidence or disregard some competent evidence. The prosecution's precommitting the jury not to consider such a relevant factor favorable to the defense as the Defendant's insanity and to deprive the Defendant of the mitigating factor of insanity, deprives Petitioner of a fair trial as provided for under the Sixth and Fourteenth Amendments to the Constitution of the United States.

V. PETITIONER WAS DENIED AN IMPARTIAL JURY BY THE FAILURE OF THE TRIAL COURT TO ALLOW INDIVIDUAL AND SEQUESTERED VOIR DIRE.

The trial court denied the Petitioner's motion of individual and sequestered voir dire at trial. Instead, the trial court allowed voir dire to take place with 24 prospective jurors in the courtroom at a time. This procedure prejudiced the Petitioner due to the inability of trial counsel to determine the effect of the intense pretrial publicity on the jurors as well as each individual juror's reaction to questions concerning their position on the death penalty, and the insanity defense.

In the recent Eleventh Circuit case of McCorquodale vs. Balkcom, 11th Cir., May 31, 1983, the court held that en masse questioning of the jurors on Witherspoon vs. Illinois, 391 U.S. 510 (1968) grounds was insufficient to give the jurors an opportunity to demonstrate a "willingness to consider all the penalties provided by state law" or an opportunity to demonstrate an absence of any "irrevocable commitment before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." Witherspoon, 391 U.S. at 522, n. 21.

The Sixth Circuit has held likewise in cases dealing with pretrial publicity. In U.S. vs. Blanton, 700 F.2d 298 (6th Cir. 1983) reversed on other grounds, the Court held that "what courts consider the most important in determining whether a presumption of prejudice should arise is the strength of the venireman's opinion on which he is asked to set aside." The court held there and in McCorquodale that the strength of the group-questioned venireman's opinion is impossible to ascertain.

The Tennessee Supreme Court, however, ruled that under state law the trial judge has broad discretion in the examination of prospective jurors and his acts will not be disturbed unless there is an abuse of that discretion. See for example, State vs. Jefferson, 529 S.W.2d 674 (Tenn. 1975) cited in the Supreme Court's opinion at page 911. In the present case, certiorari should be granted to determine if there was an abuse of this discretion due to the extensive pretrial publicity which proceeded this case. Twice before, in Weakley and Obion Counties, the trial judge had determined that the pretrial

publicity was so extensive that an impartial jury could not be impaneled. In Obion County, individual and sequetereed voir dire was permitted yet still found that an impartial jury was impossible to seat. When the trial was moved to Memphis, approximately one-half of the jury pooled was excused because they had made up their minds about the case. (Vol. 1, p. 25)

Where massive pretrial publicity has such a significant impact on the jury pool, failure to allow individual and sequestered voir dire seriously prejudices the defense in that defense attorneys are prevented from properly raising prejudicial remarks for questioning a prospective juror on a particular aspect of the case by the risk of contaminating the other prospective jurors with the same prejudicial remarks. Where the death penalty is involved, the trial court must require a thorough and informative quesioning of each juror. McCorquodale vs. Balkcom, supra. Given the extensive pretrial publicity in this case which caused venue to be changed twice in order to impanel an impartial jury and that one-half of the jury pool in Shelby County was excused for cause, the question of what constitutes an abuse of discretion in denying individual and sequestered voir dire on Witherspoon and other issues should be decided by this Court.

VI. PETITIONER WAS SUBJECTED TO DOUBLE JEOPARDY BY HIS CONVICTION OF BOTH FELONY MURDER AND THE UNDERLYING OFFENSE.

The Tennessee Supreme Court in the case of Briggs vs. State, 573 S.W.2d 157 (1978) adopted this court's rationale in Harris vs. Oklahoma, 433 U.S. 682, 97 S. Ct. 2912, 53 L.Ed.2d 1054 (1977) that dual convictions of felony murder and the underlying felony are offensive to the double jeopardy clause of the Fifth Amendment to the Constitution of the United States and Article I, Section 10 of the Constitution of the State of Tennessee and may not stand.

In the recent case of Pryor vs. Rose, 699 F.2d 287 (1983) the Sixth Circuit overturned a conviction of robbery with a deadly weapon and assault with intent to commit first degree murder as a violation of the double jeopardy clause. The Sixth Circuit cited the case of Blockburger vs. U.S., 248 U.S. 299 (1932) to show that conviction of separate offenses will be deemed multiple punishments for the same offense where conviction of one offense does not require proof of any different fact from the proof sufficient for conviction of the other. The court held that Tennessee multi-purpose first degree murder statute permitted the jury to find the defendant guilty either by proof of premeditation or by virtue of the felony murder provision in which premeditation is provided by the underlying felony. Viewing the alternative to separately charge offenses the court finds that the evidence supporting conviction of robbery was all that was needed to convict for assault with intent to commit first degree murder since felony murder instruction relieved the prosecution from having to prove premeditation. The court concluded that "a judge must simply not give a felony murder instruction where it is possible to have a conviction for the underlying felony."

Petitioner was charged in the first count of his indictment with both common law murder and felony murder. He was also charged with aggravated rape and aggravated kidnapping. T.C.A. §39-2-202(a) sets forth in the grounds for first degree murder, both common law murder in the first degree ("willfull, deliberate, malicious and premeditated killing") and felony murder ("committed in the perpetration of, or in the attempt to perpetrate . . . kidnapping . . .

rape . . . ." However, as have been previously noted, in Section III, on the day the case was set for trial in Shelby County, and before any jurors were selected, defense counsel requested to know exactly which grounds the State was proceeding on. Prosecution responded that the State would proceed on felony murder and the court indicated that it would only charge on the ground of felony murder. (Vol. 2, pp. 6-9) However, the trial judge subsequently did charge on premeditated murder as well. (Vol. 30, pp. 24-88)

Petitioner's challenge to this in the Tennessee Supreme Court was rejected on the grounds that the jury returned a general verdict of guilt to murder (Count I) and aggravated rape and aggravated kidnapping. The court quoted T.C.A. §40-18-111 as providing that "a general verdict of guilty will be sustained if there is any one good count in the indictment sustained by proof, although the other counts may be fatally defective." The court then distinguished Briggs, supra, on the grounds that there the jury returned a special verdict expressly finding the defendant guilty of murder in the perpetration of a robbery. The court held the conviction of robbery could not stand because of the Harris vs. Oklahoma rationale. The court stated though that a general verdict may be related properly to the second count (the underlying felony) with the result the conviction could be upheld for first degree murder and armed robbery. This would preclude any double jeopardy problems.

The assumption by the Tennessee Supreme Court is that there is no election to proceed by the State solely on the issue of felony murder and acquiescence in that election by the trial court. Therefore, a general verdict of guilty to the first count in Petitioner's case resulted in a finding of guilt on both grounds (premeditated murder and felony murder). Therefore, even under the Harris decision, felony murder conviction might be reversed as to the conviction on the underlying offense, but the conviction on premeditated murder stands.

Petitioner contends that the election by the State and the acquiescence by the trial judge prior to the selection of the jury, amounted to prosecution

solely on the issue of felony murder and therefore under the Harris vs. Oklahoma, and Pryor vs. Rose, supra, rationale, a conviction on both the felony murder and the underlying offense offends the double jeopardy clause. This court should grant certiorari as it has done in Thigpen vs. Roberts, No. 82-1330, to consider the question of whether or not the defendant has a "substantial claim of deouble jeopardy" under Illinois vs. Vitale, 447 U.S. 410, 110 S.Ct. 2260,65 L.Ed.2d 228 (1980).

VII. PETITIONER WAS DENIED A FAIR TRIAL BY THE PLAYING TO THE JURY OF PETITIONER'S TAPED CONFESSION AS PART OF THE PROSECUTION'S CLOSING ARGUMENT.

During closing argument, over defense objection, the prosecutor played for the jury the entire taped interview of the Defendant. (Vol. 32, p. 2345) This confession, approximately 30 minutes long, is contained in the record at Volume 20, beginning on page 1456 and ending on page 1486. The Tennessee Supreme Court agreed that the use of this confession and closing argument was an abuse of discretion, but held that it was harmless due to the fact the confession was "wholly lacking in emotion impact, too long and too boring to achieve the result asserted by the Defendant (to emotionally enflame the jury against the Defendant so the jury would kill him)." (State vs. Coe, p. 912) The Tennessee Supreme Court held that the abuse of discretion was in allowing argument which "greatly exceed in quantity the appropriate use in closing argument of exhibits, quotations from a transcript of testimony, and extra acts or statements of parties or witnesses or like material." (State vs. Coe, p. 912)

In the recent case of Hance vs. Zant, 82-8342 (11th Cir. January 24, 1983) the Eleventh Circuit held that:

> to prevail in his claim of prosecutorial misconduct and to state a habeas case, petitioner must show that the prosecutor's actions were so egregarious as to render the trial fundamentally unfair. The asserted area must be of a constitutional magnitude. This determination should be made by considering the totality of the circumstances; the prosecutor's conduct should be evaluated in the context of the entire trial.

In the present case, the use by the prosecutor in playing the entire taped confession to the jury during closing argument amounts to a constitutional infirmity. This is an entirely different situation from counsel rereading short extracts from depositions or the transcribed part of the trial. The trial judge tilted the closing argument in favor of the State by the use of such an unusual procedure. The only way to top such a performance would be to have the victim's grieving family again testify during closing argument. The sole purpose of this procedure was to emotionally enflame the jury, a purpose

rejected in Hance, supra, as rendering the trial fundamentally unfair. (See also, Davis vs. Francis, C82-182N (N.D. Georgia 1983).

CONCLUSION

Petitioner prays that a writ of certiorari issue to review the order below.

Respectfully submitted,

WOODS, BRYAN, WOODS & WATSON
A Professional Law Association

By: Larry D. Woods by [signature]
Larry D. Woods

By: [signature]
William J. Marett, Jr.

Counsel for Petitioner

121 Seventeenth Avenue South
Nashville, Tennessee 37203
(615) 259-4366

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Petition has been placed with the United States Mail, postage prepaid, and addressed to William Leach, Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219 and to Hugh W. Stanton, Jr., District Attorney for Shelby County, 210 Poplar Avenue, Room 30, Memphis, Tennessee 38103, this the 2d day of November, 1983.

[signature]
William J. Marett, Jr.

RECEIVED
NOV 4 1983
OFFICE OF THE CLERK
SUPREME COURT U.S.

IN THE SUPREME COURT FOR THE UNITED STATES
October Term, 1983

ROBERT GLENN COE,
Petitioner

vs.

STATE OF TENNESSEE,
Respondent

No. 83-5705

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, Robert Glenn Coe, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Tennessee without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53. Attached hereto is the Affidavit from the Petitioner who is currently incarcerated at the Tennessee State Pentitentiary in Nashville, Tennessee in support of this Motion.

Respectfully submitted,

WOODS, BRYAN, WOODS & WATSON
A Professional Law Association

By: Larry D. Woods by WJM
Larry D. Woods

By: William J. Marett, Jr.
William J. Marett, Jr.

Counsel for Petitioner Robert Glenn Coe

121 Seventeenth Avenue South
Nashville, Tennessee 37203
(615) 259-4366

83-5705

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion has been placed with the United States Mail, postage prepaid, and addressed to William Leech, Attorney General, State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee 37219 and to Hugh W. Stanton, Jr., District Attorney General for Shelby County, 210 Poplar Avenue, Room 30, Memphis, Tennessee 38103, this the 2nd day of Nov., 1983.

William D. Marett, Jr.

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IN THE SUPREME COURT OF
THE UNITED STATES
October Term, 1983

ROBERT GLENN COE,
Petitioner

vs.

STATE OF TENNESSEE,
Respondent

No. 83-5705

AFFIDAVIT

I, ROBERT GLENN COE, being duly sworn, depose and say, in support of my Motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the Petitioner in the above-styled case.

2. Because of my proverty I am unable to pay the costs of said cause; I own no real or personal property, I am incarcerated in the Tennessee State Penitentiary in Nashville, Tennessee and receive no income from earnings.

3. I am unable to give security for this action.

4. Counsel is serving on my behalf without renumeration on this petition for writ of certiorari.

5. I believe that I am entitled to the redress I seek in this action.

6. The nature of this action is briefly stated as follows:

I was convicted in Shelby County, Tennessee, Criminal Court of murder in the first degree on February 26, 1981. I was given the death penalty for this offense. I was also found guilty on February 27, 1981 of aggravated rape and kidnapping and received life sentences for these offenses. I am being held under the sentence of death at the Tennessee State Pentitentiary. My

direct appeal to the Tennessee Supreme Court was denied on June 27, 1983 and a timely request for rehearing was denied on September 6, 1983. I believe that errors were committed during the course of my trial in violation of my Constitutional rights and that the death sentence was imposed upon me in violation of my Constitutional rights.

ROBERT GLENN COE

STATE OF TENNESSEE

COUNTY OF

Sworn to and subscribed before me this the 17th day of September, 1983.

Notary Public

My commission expires:

1/26/85

dered by the Court, wherein it is conceded that the tax lien is unenforceable and that the State cannot maintain any action affecting plaintiff's title to the realty in question because of the bar of the statute of limitations. This concession renders plaintiff's complaint moot and it is therefore unnecessary that we state our reasons for not adjudicating the status of the tax lien.

The petition to rehear is respectfully denied.

COOPER, BROCK, HARBISON and DROWOTA, JJ., concur.

STATE of Tennessee, Appellee,

v.

Robert Glen COE, Appellant.

Supreme Court of Tennessee, at Jackson.

June 27, 1983.

Opinion on Petition to Rehear Sept. 6, 1983.

Defendant was convicted in the Criminal Court, Shelby County, William Williams, J., of aggravated kidnapping, aggravated rape and murder in the first degree, and he directly appealed. The Supreme Court, Fones, C.J., held that: (1) abundant probable cause existed to order arrest and to arrest defendant without a warrant; (2) evidence was sufficient to sustain conviction; (3) male defendant lacked standing to challenge grand jury composition on basis that women were systematically excluded; (4) impermissible double use of felony-rape to convict defendant of rape and of felony-murder did not occur; (5) although trial judge erred in allowing State to replay entire taped interview of defendant with investigating officer during State's closing argument, error was harmless beyond a reasonable doubt; and (6) imposition of death penalty was neither excessive nor disproportionate to penalty imposed in similar cases.

Affirmed.

Brock, J., concurred in part and dissented in part with opinion.

1. Arrest ⇐63.4(12)

Where composite drawing of suspect and description of car was publicized by media, and officer received information that description bore likeness to defendant who was reported to have a vehicle similar to one described as driven by suspect, abundant probable cause existed to order arrest and to arrest defendant without a warrant.

2. Homicide ⇐253(1)
Kidnapping ⇐5
Rape ⇐51(1)

Evidence in prosecution for aggravated kidnapping, aggravated rape and murder in the first degree, including defendant's confession whose reliability was greatly enhanced by identical fact testimony from other eyewitnesses to same events, was sufficient to sustain conviction.

3. Grand Jury ⇐2½

Male defendant lacked standing to challenge grand jury composition in county on basis that women were systematically excluded.

4. Grand Jury ⇐2½

Even if male defendant had standing to challenge grand jury composition in

county on basis that women were systematically excluded, proof adduced did not support a finding of requisite elements of substantial underrepresentation of women as result of systematic exclusion in grand jury-selection process nor was there a showing of discriminatory intent.

5. Indictment and Information ⇐144.1(2)

Trial judge did not err in overruling, for failure to show prejudice, defendant's motion to dismiss indictment because district Attorney General was present during grand jury proceedings, where there was no evidence in record of what transpired during the proceedings or when a vote was taken on the indictment.

6. Jury ⇐131(13)

Trial judge did not err in overruling defendant's motion to allow individual voir dire of each prospective juror out of presence and hearing of other jurors, where an impartial jury was selected, which was properly committed to try defendant only on evidence presented at trial, and which was uninfluenced by any pretrial publicity or any information imparted to venire during voir dire.

7. Criminal Law ⇐1152(2)

Trial judge has wide discretion in examination of prospective jurors and his action will not be disturbed unless there is an abuse of discretion.

8. Jury ⇐106, 131(17)

Trial judge did not err in allowing State to ask jurors if they believed that anyone who would harm an eight-year-old child would have to be insane to do anything like that and in excusing for cause one or two jurors who appeared to entertain a predisposition to conclude from that fact alone that insanity was indicated, as State's question did not result in any commitment of jurors beyond appropriate willingness to decide issue of insanity on all of the evidence adduced at trial, free of any preconceived notion that mere fact of harming an eight-year-old child constituted prima facie evidence justifying a presumption of insanity.

9. Criminal Law ⇐1166.16

Failure of State to examine jury on premeditation did not prejudice defendant where proof on element of premeditation was known in advance and consisted of defendant's written and taped statements, plus dual causes of death, namely strangulation and stabbing.

10. Criminal Law ⇐29

Impermissible "double use of felony-rape to convict not only of rape but of felony-murder did not occur where defendant was charged with common-law murder, jury returned a general verdict, and record contained proof of premeditation beyond a reasonable doubt, allowing court to sustain conviction for common-law murder and felony-rape.

11. Criminal Law ⇐699, 1154

Trial judge has broad discretion in what counsel may be allowed to do in closing argument and will not be adjudged in error absent abuse of discretion.

12. Criminal Law ⇐715, 1171.8(1)

Although trial court erred in allowing State to replay entire taped interview of defendant by investigating officer during State's closing argument, since it greatly exceeded in quantity appropriate use in closing argument of exhibits, quotations from transcript of testimony, and extracts from statements of parties or witnesses or like material, error was harmless beyond a reasonable doubt, since it was the overwhelming evidence that convicted defendant, not replaying tape during closing argument.

13. Criminal Law ⇐1206.2(2)
Homicide ⇐354

Imposition of death penalty by jury in prosecution for aggravated kidnapping, aggravated rape and murder in the first de-

gree was neither excessive nor disproportionate to penalty imposed in similar cases.

14. Homicide ⇐354

Evidence in prosecution for aggravated kidnapping, aggravated rape and murder in the first degree, including fact that victim, if she had lived, could have identified defendant as man who kidnapped and raped her, supported jury's finding of aggravated circumstance that murder was committed for purpose of avoiding, interfering with, or preventing a lawful arrest for prosecution of defendant.

Walker Gwinn, Memphis, for appellant.

William M. Leech, Jr., Atty. Gen., Gordon W. Smith, Asst. Atty. Gen., Nashville, for appellee.

OPINION

FONES, Chief Justice.

This is a direct appeal of a death penalty case. Defendant was convicted of aggravated kidnapping, aggravated rape and murder in the first degree. The jury fixed his punishment at life on each of the first two offenses. After a bifurcated sentencing hearing, the jury found four aggravating circumstances and no mitigating circumstances and imposed the death penalty. The aggravating circumstances found were: (1) the murder was committed against a person less than twelve years of age and the defendant was over eighteen years of age; (2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; (3) the murder was committed for the purpose of avoiding prosecution of the defendant; and (4) the murder was committed while the defendant was engaged in committing and fleeing after committing rape and kidnapping.

I.

The victim, Cary Medlin, eight years of age, lived in Greenfield, Tennessee with her mother Charlotte Medlin Stout, her step-father Mickey Stout, and her step-brother Michael Stout, also eight years of age. On Saturday September 1, 1979, Labor Day Weekend, Cary and Michael went riding on their bicycles about 5:30 P.M.

Defendant was living in McKenzie, Tennessee, and working at a body shop. His wife and baby had gone to Dresden, approximately fifteen miles from McKenzie to visit his wife's sister, Vicky Box. When defendant got off work that Saturday afternoon he drove toward McKenzie to join his wife and baby. Because a bridge was out on the Liberty Road, his route to Dresden was through Greenfield.

When defendant arrived in Greenfield, he began looking around for someone to "flash" at because he "had had the urge to flash all day but could not find anyone to flash at."[1]

Defendant drove into the parking lot of a church in the neighborhood where the victim lived and parked. Soon he saw Cary and Michael on their bicycles, left the parking lot, pulled along side of them, and asked Cary to show him where her father lived. Margaret Stout, Mickey Stout's mother, lived on the street directly behind her son's house, and Cary and Michael had just paid her a visit, looking for some candy. Shortly thereafter she was looking out the window as she talked on the telephone and saw her grandson and Cary standing by their bicycles and talking to a man in a car she described as a two-toned brown four door, the top being darker than the bottom.

Defendant induced Cary and Michael to follow him, apparently from in front of Margaret Stout's house to the church parking lot. Cary got in the car with defendant and told Michael to watch her bicycle. Defendant drove around until he found a lonely, deserted gravel road that led nowhere and was well screened by trees with a fence row on each side.

Defendant's September 7, 1979 statement related that he stopped the car, exposed

1. Defendant's statement given September 7, 1979.

himself to Cary, fondled her, starting masturbating and got on top of her, but that he did not know if his penis went into her or not. Defendant stated that when he finished his sex act, Cary told him that Jesus loved him, and he got so upset he decided to kill her. First, he tried to choke her to death with his hands but although she got blue in the face, she would not die. He then stabbed her in the neck with his pocket knife. After watching her bleed, "struggle and jerk" for a while, he left her beside the road in a dense thicket and drove away.

Local and state police were notified early Saturday evening that Cary was missing, and at first they thought she might have been kidnapped for ransom, but after receiving no demand for ransom, on Sunday afternoon an intensive search of the area was conducted and her body discovered about 2:00 P.M., approximately two miles from the town of Greenfield.

According to Donald Box, defendant's brother-in-law, defendant arrived at the Box home in Dresden about 7:45 or 8:00 P.M. Saturday night. He was driving a 1972 Ford Torino, was not intoxicated or under the influence of drugs but was nervous, seemed to have something on his mind and said to his brother-in-law, "Donnie, I would be better off dead."

Defendant, his wife, and child, returned to McKenzie on Sunday, September 2, but they spent Sunday night and Monday night with friends, Janet and Darrell Ross who lived in the Big Buck community about ten miles from McKenzie. Janet Ross testified that after visiting earlier in the day they came back about 10:00 P.M. Defendant told them that he was in trouble with the law; that he and his cousin had gone to Camden to get some marijuana and some acid; that his cousin had shot a state trooper; and that defendant had stabbed one in the throat.

On Monday, Labor Day, at defendant's request, Janet Ross and defendant's wife bought some hair dye and that night dyed defendant's hair black. He had been described by witnesses as having dirty blond hair, shoulder length. On Tuesday morning, defendant went to a used car dealership in Gleason, Tennessee and traded his 1972 Ford Torino, silver gray with a brown vinyl top, for a 1972 blue Mustang. Later that day Margaret Stout and Michael Stout were driven to the premises of the Gleason dealer where they identified the Torino as the vehicle that had been in Greenfield on Saturday afternoon and that Cary had entered and departed the church parking lot.

Barry Jones, owner of Crestview Motors, the Gleason used car dealer, testified that he had sold the 1972 four-door Ford Torino, silver/gray with brown vinyl top, to defendant in June of 1979. His wife, Alice Jones, did all of the paperwork connected with her husband's used car business. She testified that she wrote up the June sale of the Ford Torino to defendant and that she remembered that he had dirty blond hair at that time; that she saw him again on the morning of September 4, and wrote up the trade of the Torino for the blue Mustang at approximately 10:00 A.M.; that she noticed that his hair had been dyed black; that there were black smudge marks on his forehead; and that it was an obviously sloppy dye job. She testified that her husband left while she was writing up the papers and that after defendant and his friend left, the chief-of-police of Gleason came by and asked if they had traded cars with anyone. She told him about the trade with defendant and showed him the Ford Torino. The police chief made a telephone call and then requested that the Ford Torino be locked up and not shown to anyone except law officers. Mrs. Jones testified that shortly thereafter the place was "covered up with law officers" looking at the car and that a lady and a little boy came by and were shown the car by the law officers.

Darrell Ross was with defendant when he traded the gray-brown Torino for the blue Mustang Tuesday morning, when defendant went to the bus station in Huntingdon to buy a bus ticket that afternoon and still

later when defendant returned to the bus station to leave for Marietta, Georgia. Defendant was arrested at the Huntingdon bus station. Defendant had identification tags on his baggage and the name thereon was James Watson.

Agent Daniel and Inspector Blackwell transported defendant from Huntingdon to the Weakley County Jail in Dresden. Daniel testified that they did not question defendant during the trip; that when they arrived and turned defendant over to the sheriff, they went down the hall, spoke briefly to the District Attorney seeking to find out if defendant's wife had been interrogated, then returned to the sheriff's office where defendant asked to talk to Daniel in private. This occurred seven or eight minutes after their arrival at the Weakley County Jail. When Daniel and defendant were alone, defendant said, "I did it," and in response to the question, "You did what, Robert?" he said, "I am the one that killed that little girl." With Inspector Blackwell also present, defendant then consented to talk to Daniel on tape. The tape recording was played in open court in the presence and hearing of the jury and revealed that the questioning began at 7:49 P.M. on September 4, 1979, at the Weakley County Jail.

Defendant's responses to Daniel's questions revealed that he went to Greenfield, saw a little girl and a little boy on bicycles, that he stopped them and told her that he was looking for her daddy in order to lure her into the car with him, having been unsuccessful in several attempts at flashing; that he drove and that the little girl and boy rode their bicycles to a church where she left her bicycle and got in the car with him and they drove away from the church. Those details were identical to those related by little Michael Stout. In the taped statement he also told of driving around until he "found that gravel road;" that after he had raped the little girl and she told him that Jesus loved him, he choked her and stabbed her with his pocket knife.

The next day, September 5, 1979, Daniel and Blackwell went to the Weakley County Jail, read defendant his rights again, and he agreed to accompany them in a State car and show them what he did on the previous Saturday afternoon. Defendant directed the officers to the church in Greenfield where the victim got in his car and along the route he took from the church to the murder scene, that is, the gravel lane off Bean Switch Road. While on that route defendant pointed out a house that was close to the road that he had passed on Saturday with the victim in the car and that led to a ball park where he turned around and came back by the same house. He told Daniel that there was a man sitting on the porch that "will remember me or my car."

Herbert Clement, aged eighty-five, testified that he lived in that house about a mile out of Greenfield; that he was sitting on his porch between 5:30 and 6:00 P.M. on Saturday afternoon, September 1, 1979, when a car drove by going south to the ball park and then came back by going north; that he recognized the little girl passenger because he had seen her riding her bicycle on previous occasions; and that he identified the victim, Cary Medlin, from her photograph as the passenger in the car. He was unable to describe the car or to describe the man driving it.

Doctor James Spencer Bell, a board certified pathologist and Chief Deputy, Shelby County and State Medical Examiner, testified that he performed an autopsy on the body of Cary Medlin on September 3 and 4, 1979. He found evidence of manual strangulation and a stab wound to the neck that cut the carotid artery and jugular vein, either of which could have produced death. It was his opinion that both the strangulation and the stabbing were applied while Cary was alive, that she "lived a short time after the application of these two and death then resulted." He found "a laceration of the hymenal ring and a tear and abrasion extending up the vaginal canal into the

internal aspects of the body." Bruises and lacerations were also found in the anal area and swabs were taken from both the vaginal and anal areas. He testified that the bruises and lacerations in the vaginal and anal areas were "live" lesions that were inflicted prior to death.

A forensic serologist testified that she analyzed the swabs taken by Dr. Bell from the body of the victim and found the presence of spermatozoa upon testing the matter upon the vaginal and anal swabs.

II.

[1] Defendant contends that admission of the statement given by defendant on September 7, 1979, and implicitly the tape, wherein defendant confessed, was erroneous because the State had failed to prove probable cause for arresting defendant at the Huntingdon bus station and therefore the confession was the product of an illegal arrest. There is no merit to that issue.

Alvin Daniel testified that he was the Tennessee Bureau of Investigation agent in charge of the investigation of Cary Medlin's murder. He testified that a composite drawing of the suspect and a description of the car was publicized by the media; that he received information that the description bore a likeness to defendant who was reported to be a resident of McKenzie and had a vehicle like the one described as driven by the suspect; that agents were dispatched to McKenzie who learned that defendant had traded his car at Crestview Motors in Gleason, a town about eight or ten miles from McKenzie; that he telephoned Crestview Motors and learned that defendant had traded his two toned Ford Torino for a blue Mustang; and that the person who traded the car showed evidence of having recently dyed his hair black. Daniel then had Margaret Stout and Michael Stout taken to Gleason and they identified the Torino as the vehicle they had seen Saturday in Greenfield and in which Michael had last seen the victim leave the church parking lot. Daniel then received a report that two agents had stopped a blue Mustang occupied by Darrell Ross and Tammy Coe, defendant's wife, and they reported that they had driven defendant to the bus station in Huntingdon, that he had dyed his hair black and was leaving town. Daniel then broadcast a directive that defendant be arrested at the bus station in Huntingdon. We hold that abundant probable cause existed to order the arrest and to arrest defendant without a warrant. The officers responding to Daniel's request were entitled to assume that he had information constituting probable cause to order the arrest. *C.f., Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 568, 91 S.Ct. 1031, 1037, 28 L.Ed.2d 306 (1971).

III.

[2] Defendant's argument that the evidence was insufficient to support the guilty verdict is predicated principally on the allegation that the State relied ninety-nine percent on Coe's actions and statements after the fact which, it is said, was unreliable because Coe is a mentally disturbed individual with bizarre fantasies and weird behavior.

The jury rejected defendant's plea of insanity and that finding was supported by overwhelming lay and expert testimony. His wife Tammy, his sister-in-law and brother-in-law, Vickie and Donald Box, and his friends Janet and Darrell Ross, the persons he spent all of his time with for three days and nights immediately following the murder, testified without exception that his behavior was normal except for concern that he might be apprehended by police—which he accounted for to them by relating the false story that he and his cousin had had an encounter with two state troopers.

It is true that Coe's actions and statements after the crime point unerringly to his guilt. The reliability of his statements was greatly enhanced by identical fact testimony from other eye-witnesses to the same events. The recitation of evidence in section one of this opinion speaks for itself

on the issue of the sufficiency of the evidence to convince any rational trier of fact of the guilt of Robert Glen Coe of kidnapping, rape, and murder. We find that the evidence of defendant's guilt fully satisfied the standard prescribed in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) and T.R.A.P. 13(e).

IV.

Defendant insisted that the indictment should have been dismissed because the grand jury in Weakley County that returned it did not represent a fair cross-section of the community. Defendant attempted to show that women were substantially under-represented and had been for many years systematically excluded.

Defendant does not challenge the composition of the petit jury venire. Proof was adduced that defendant's grand jury pool consisted of two hundred women, five hundred men, or 70.4% male, 29.59% female. Three women and ten men served on the grand jury that indicted defendant. The three preceding grand jury pools had female percentages of 42%, 37.77% and 22.35%. The population of Weakley County eligible for jury service was shown to be 50.8% female based upon the 1970 census. The testimony of the jury commissioners disclosed that they choose the jurors from the voter registration lists, generally selected people they or others knew that met the statutory criteria, divided their selections proportionately within the alphabet, and testified they specifically sought females, blacks, and young voters in an amount proportionate to the county population.

The State contends that defendant does not have standing to challenge the exclusion of women from grand jury service. The State's position, in summary, is that the composition of grand juries in State courts is not subject to challenge as violative of the Sixth or Fourteenth Amendments on the grounds of gender discrimination, as distinguished from racial discrimination, with the exception that an equal protection challenge could be mounted by a member of the group against whom there is alleged discrimination. This, of course, excludes a challenge by a male defendant of female discrimination from service upon the grand jury.

The State relies primarily upon *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972). There the U.S. Supreme Court had under consideration the identical challenge before us, that of a male complaining of constitutionally improper exclusion of women from grand jury service. The Supreme Court denied relief to Alexander and made the following comments on the state of the law applicable to his constitutional claims:

> This claim is novel in this Court and, when urged by a male, finds no support in our past cases. The strong constitutional and statutory policy against racial discrimination has permitted Negro defendants in criminal cases to challenge the systematic exclusion of Negroes from the grand juries that indicted them. Also, those groups arbitrarily excluded from grand or petit jury service are themselves afforded an appropriate remedy. Cf. *Carter v. Jury Commission of Greene County* [396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549], *supra*. But there is nothing in past adjudications suggesting that petitioner himself has been denied equal protection by the alleged exclusion of women from grand jury service. Although the Due Process Clause guarantees petitioner a fair trial, it does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury. In *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), the Court held that because trial by jury in criminal cases under the Sixth Amendment is "fundamental to the American scheme of justice," id., at 149, 88 S.Ct., at 1447, such a right was guaranteed to defendants in state courts by the Fourteenth Amendment, but the Court has never held that

federal concepts of a "grand jury," binding on the federal courts under the Fifth Amendment, are obligatory for the States. *Hurtado v. California*, 110 U.S. 516, 538, 4 S.Ct. 111, 122, 28 L.Ed. 232 (1884). *Id.* 405 U.S. at 633, 92 S.Ct. at 1226–1227.

Also, in *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), the Supreme Court held that:

> In order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial under-representation of his race or of the identifiable group to which he belongs. *Id.* at 494, 97 S.Ct. at 1280.

Defendant contends that *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) supports his assertion that he may challenge the exclusion of women from grand jury service. In *Taylor*, a male alleged gender discrimination, that is, the exclusion of women from the *petit* jury venire. In our opinion *Taylor* did not alter the pronouncements quoted above from *Alexander* and *Castaneda* with respect to *gender* discrimination in the composition of *grand* juries. In defendant's reply brief he directs our attention to a footnote in *Alexander v. Louisiana*, *supra* at 626 fn. 3, 92 S.Ct. at 1223, fn. 3, which reads in part as follows:

> The principles that apply to the systematic exclusion of potential jurors on the ground of race are essentially the same for grand juries and for petit juries, however.

The accuracy of that statement is not questioned but defendant Coe's attack is based upon gender discrimination, not racial discrimination.[2]

[3, 4] We hold that defendant lacks standing to challenge the grand jury composition in Weakley County on the basis that women are systematically excluded. We are also of the opinion that if we considered the claim on its merits the proof did not make out a case of constitutionally impermissible systematic exclusion. The proof adduced did not support a finding of the requisite elements of substantial underrepresentation as a result of systematic exclusion in the grand jury selection process. Also there was no showing of discriminatory intent.

V.

[5] Defendant contends that the indictment should be dismissed because the District Attorney General was present during the grand jury proceedings on December 11, 1979.

When defendant's motion to dismiss came on for hearing in the trial court, defendant's counsel stated that he assumed it would be up to the District Attorney General to state what took place during the grand jury proceedings. The District Attorney General's response was simply that the State denied that defendant was prejudiced by anything that occurred at the grand jury proceedings.

There being no evidence in this record of what transpired during the proceedings or when the vote was taken on the indictment, we must sustain the action of the trial judge in overruling defendant's motion, for failure to show prejudice. *See, e.g., Tiller v. State*, 600 S.W.2d 709 (Tenn.1980).

VI.

Defendant's next issue asserts that the trial judge erred in overruling his motion to allow individual voir dire of each prospective juror out of the presence and hearing of other jurors.

The trial judge clearly indicated that if, as the voir dire examination progressed, it appeared appropriate to conduct individual voir dire he would do so.

2. For a more detailed analysis of the United States Supreme Court cases on the issue of standing involved here, see *Beal v. Rose*, 532 F.Supp. 306 (M.D.Tenn.1981).

Defendant points to the "tremendous" number of jurors that were excused on the basis that they had made up their minds about the case based on pre-trial publicity. Venue was removed from Weakley County to Obion County on May 5, 1980. Jury selection began in Obion County on May 19, 1980, and continued until May 27, when defendant again moved for a change of venue which was granted. The trial began in Shelby County on February 10, 1981. In spite of the fact that a number of Shelby County jurors were excused because they were equivocal about the effect of pre-trial publicity, nothing inflammatory nor prejudicial to defendant was revealed during the voir dire.

[6, 7] We have carefully reviewed the extensive voir dire examination as recorded in the transcript. In our opinion, an impartial jury was selected, properly committed to try defendant only on the evidence presented at the trial, uninfluenced by any pre-trial publicity or any information imparted to the venire during the voir dire. The trial judge has wide discretion in the examination of prospective jurors and his action will not be disturbed unless there is an abuse of discretion. *See, e.g., State v. Jefferson*, 529 S.W.2d 674 (Tenn.1975).

VII.

[8] Defendant insists that the trial judge erred in allowing the State to ask jurors if they believed that anyone who would harm an eight-year-old child, "would have to be insane to do a thing like that," and in excusing for cause one or more jurors who appeared to entertain a pre-disposition to conclude from that fact alone that insanity was indicated.

Defendant argues that such questions committed the jurors, in advance of hearing the evidence, "to the proposition that they would not feel that the defendant was insane, ... by reason of the fact that he deliberately killed an eight-year-old girl."

We disagree that the State's questioning resulted in any commitment beyond the appropriate willingness to decide the issue of insanity on all of the evidence adduced at the trial, free of any preconceived notion that the mere fact of harming an eight-year-old child constituted prima facie evidence justifying a presumption of insanity. This issue has no merit.

VIII.

[9] Defendant says the trial court erred, "in trying this case as a common-law premeditated murder charge after stating in clear and unequivocal terms, prior to the voir dire examination of the jurors, that he would not charge on common-law premeditated murder."

The first count of the indictment returned by the Weakley County grand jury charges defendant with both common-law premeditated murder and felony murder. Defendant's brief concedes that and also makes the following concession:

> "We are not even arguing that the State, with the consent of the defendant, could narrow the issue to felony murder."

On the day the case was set for trial in Shelby County and before any jurors were brought into the courtroom, the trial judge and counsel were going over a number of preliminary matters and the trial judge observed that the first count of the indictment charged both common-law murder in the first degree and felony murder and that in Shelby County, the practice was to charge common-law premeditated murder and felony murder in two separate counts. The Weakley County prosecutor indicated the State was proceeding only on the felony murder count, but the Shelby County prosecutor said he understood the State was proceeding on both common-law and felony murder. At that point the trial judge said that he would "proceed" on the assumption that there was a one count indictment charging felony murder.

After the jury was selected but before any testimony was presented, out of the presence of the jury the trial judge in-

formed counsel that he would not be bound by the State's election to proceed only on felony murder and that he might charge common-law murder in the first degree; that it worried him not to "charge on something that was set forth in the indictment. Clearly, your common-law count of premeditation is set forth."

The State did not examine the jury on premeditation. Defendant has cited no authority nor suggested how he was prejudiced by the failure to examine the jury on premeditation or what the examination would have involved. The proof in this case on the element of premeditation was known in advance and consisted of defendant's written and taped statements, plus the dual causes of death, to wit: strangulation and stabbing. In our opinion, any emphasis on premeditation during voir dire would not have been advantageous to defendant. We find no merit in this issue and it is overruled.

IX.

[10] Defendant says that the crime of rape was used to convict him of felony murder and that to use the same felony and convict him of rape violated the double jeopardy provisions of the State and Federal Constitutions.

Defendant argues that he could not have been convicted of common-law murder because of the same sequence of events at the trial that are stated in section VII of this opinion, therefore double use of the felony rape has impermissibly occurred. That assumption is erroneous. The jury returned a general verdict. T.C.A. § 40-18-111 provides that, "A general verdict of guilty will be sustained if there is any one good count in the indictment sustained by proof, although the other counts may be fatally defective." This record contains proof of premeditation beyond a reasonable doubt, allowing the courts to sustain a conviction of defendant for common-law murder and the felony of rape. In *Briggs v. State*, 573 S.W.2d 157 (Tenn.1978), the jury returned a special verdict, expressly finding defendant guilty of murder in the perpetration of a robbery. We held that the conviction of robbery could not stand because of the jury's special verdict but also noted that if a general verdict had been returned, defendant having been indicted for both common-law and felony murder, convictions of common-law murder and the felony of robbery could have been upheld. 573 S.W.2d at 158.

X.

[11, 12] Defendant contends that the trial judge erred in overruling defendant's objection and in allowing the State to replay the entire taped interview of defendant by T.B.I. Agent Daniel during the State's closing argument. As defendant readily concedes, the trial judge has broad discretion in what counsel may be allowed to do in closing argument and will not be adjudged in error absent an abuse of discretion. *State v. Sutton*, 562 S.W.2d 820, 823 (Tenn.1978). We agree with defendant that the trial judge abused his discretion in allowing the State to replay the tape. However, our reason for finding the trial judge in error differs from that of defendant. Defendant asserts that it was improperly allowed because its sole purpose was to "emotionally inflame the jury against the defendant so the jury would kill him." In our opinion, the taped statement was wholly lacking in emotional impact, too long and too boring to achieve the result asserted by defendant. We hold that it was an abuse of discretion because it greatly exceeded in quantity the appropriate use in closing argument of exhibits, quotations from a transcript of testimony, and extracts from statements of parties or witnesses or like material. Nevertheless, we are convinced that it was an error that was harmless beyond a reasonable doubt. In our opinion, it was the overwhelming evidence that convicted defendant, not the replaying of the tape during closing argument.

XI.

Defendant asserts that the sentence of death imposed by the jury was excessive

and disproportionate to the penalty imposed in similar cases.

Defendant argues that, "at least in modern history," no one has been sentenced to death who has spent over two years in a mental institution. Defendant further says that of ninety trial judge reports on cases wherein the death penalty was sought, eight of the defendants apparently had personality disorders and only one of the eight, Ronald Rickman, was sentenced to death. *See State v. Groseclose*, 615 S.W.2d 142 (Tenn.1981).

[13] From our review of this case, including the trial judge reports and cases mentioned, we are of the opinion that the imposition of the death penalty by the jury was neither excessive nor disproportionate to the penalty imposed in similar cases. *See, e.g., State v. Johnson*, 632 S.W.2d 542, 548 (Tenn.1982).

XII.

[14] Defendant says the evidence does not support the finding of the jury that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest for prosecution of the defendant or another.

This contention was primarily based upon defendant's assertion that the jury could not accept part of defendant's confession and reject the part wherein defendant said he killed the victim because she said that Jesus loved him.

There can be no doubt from the circumstances of this case that the victim, if she had lived, could have identified defendant as the man who kidnapped and raped her and that therefore he had a strong motivation to silence her forever as a witness. The record also revealed that defendant frequently told false stories and made up false events. Several members of the victim's family testified that it would have been out of character for Cary Medlin to make the statement ascribed to her by defendant. In our opinion, the evidence supports the jury's finding of this aggravating circumstance beyond a reasonable doubt and we find no merit in this issue.

XIII.

Defendant's contention that the Tennessee death penalty statutes are unconstitutional has no merit, having been considered and overruled in several prior cases. *See, e.g., State v. Austin*, 618 S.W.2d 738 (Tenn. 1981).

The judgment of conviction of the three offenses and the sentences imposed in the trial court are affirmed. The death sentence will be carried out as provided by law on the tenth (10th) day of October, 1983, unless stayed by appropriate authority. Costs are adjudged against defendant.

COOPER, HARBISON and DROWOTA, JJ., concur.

BROCK, Justice concurring in part and dissenting in part.

I concur in the opinion of the Court in all respects except the constitutionality of the death penalty. With respect to the constitutionality of the death penalty, I adhere to my views as set out in my dissenting opinion in *State v. Dicks*, Tenn., 615 S.W.2d 126, 132 (1981).

OPINION ON PETITION TO REHEAR

FONES, Chief Justice.

A petition to rehear has been filed on behalf of Robert Glen Coe, has been given careful consideration by the Court and found to be without merit.

The petition is respectfully denied.

EXHIBIT B

CONSTITUTIONAL PROVISIONS

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

EXHIBIT C

STATUTORY PROVISIONS

T.C.A. §22-2-201 Establishment - Members' qualifications - Compensation. (a) There shall be a board of jury commissioners for each county in this state having a ponulation of not more than one hundred forty-nine thousand nine hundred ninety-nine (149,999) and for each county in this state have a population of more than four hundred eighty-two thousand (482,000) according to the federal census of 1950 or any subsequent federal census, to be appointed by the judge or judges of the circuit court or courts, as the case may be, in each of said counties, acting conjointly with the judge or judges of the criminal court, if such there be in such counties, and acting conjointly with any chancellor or other judge, if such there be, whose duty it shall be to hold the circuit or criminal court in such counties.

(b) The board of jury commissioners for each said county shall consist of three (3) discreet persons who are at least twenty-five (25) years of age, who are and have been residents of the county for at least five (5) years and reside in different sections of the county, who are not practicing attorneys at law or state or county officers, and who have no suit pending in any one (1) of said courts above mentioned at the time of appointment. No person who has solicited or caused to solicit his or her appointment to said board shall be eligible for appointment thereto. Each member of said board shall be paid the sum of twenty-five dollars ($25.00) for each day or fraction thereof spent in the discharge of the duties of the board, which shall be paid by the county from its general fund. Provided, however, in counties having a population over six hundred thousand (600,000) according to the 1980 federal census or any subsequent federal census, the chairman of the jury commission shall devote full time to the work of the commission and the salary for his services shall be set by the county legislative body and the county legislative body shall set a sum per day for the service of the remaining jury commissioners.

T.C.A. §22-2-302 Selection of names for jury list - Jury book - Jury box - Method of selection in Shelby County. (a)(1) Said board of jury commissioners shall meet in the circuit court clerk's office at a time fixed by the judge or judges appointing said board, and on the first Monday in the month in which such original meeting is held every two (2) years thereafter, and shall then and there select, from the tax records and the permanent registration records of the county, or other available and reliable sources, a list of names of upright and intelligent persons known for their integrity, fair character and sound judgment who are otherwise legally qualified to serve as jurors from each district in the county and in proportion to the population of such districts, as near as may be, to serve as jurors in the circuit and criminal courts of such county for the ensuing two (2) years.

(2) The number of such names to be placed on said list shall be that number determined by the judge or judges appointing the board as provided in part 1.

(3) Said list shall constitute the jury list for two (2) years from the making thereof and shall not during said two (2) years from the making thereof and shall not during said two (2) years be added to or taken from, except as hereinafter provided.

(b)(1) The circuit court clerk as clerk of the board shall purchase a suitable and well-bound book in which to record the list.

(2) At the top of each page shall be written or printed the words, "Jury list for _____ County." Said book shall be so ruled as to leave a space at the left-hand side of each page for the names and at the right-hand side for such entries as hereinafter provided for.

(3) Preceding the list of names in said book shall be written these words, "Jury List Selected by the Board of Jury Commissioners for _____ County, on the _____ day of _____, 19____." Immediately following this heading shall be recorded the list of jurors selected, placing one(1) name on each line, arranging the names in alphabetical order and numbering them on the left-hand side consecutively, beginning with No. 1. After each name there shall be placed in parentheses the initials of the commissioner proposing such name, but no name shall be placed on such list except by a majority vote of the board.

(4) At the end of the list shall be written and signed by the commissioners the following: "We, the Jury Commissioners of _____ County, certify that the foregoing is the jury list selected by us for the next two (2) years for said county. This the _____ day of _____, 19____."

(c)(1) The names on said list preceded by the original number thereof and followed with the initials in parentheses of the commissioners who proposed the name shall be written by the clerk on tickets or cards of paper uniform in size, and placed in a box to be known as the jury box in the presence of the commissioners, said box to be kept securely locked and under seal, and it shall not be unlocked or the seal broken except by the order of and in the presence of the board and the clerk, and then only for the purpose of refilling the box or drawing therefrom the names of jurors for jury service, or in open court by order of the judge holding said court for good and sufficient cause, or by order of the judge holding said court as thereinafter provided.

(2) Said jury book shall be kept in secret by the clerk under lock and key and no one shall be allowed to inspect the same except the presiding judge, the jury commissioners or the clerk with the said commissioners when in discharge of their official duties.

(d) In any county of this state, if a majority of the circuit and criminal law judges and chancelors holding court in the county finds that the tax records and permanent registration records of the county, or other available and reliable sources, are so tabulated and arranged that names can be selected therefrom by mechanical or electronic means in such manner as to assure proportionate distribution of names selected without opportunity for the intervention of any human agency to select a particular name, then and in that event, such judges and chancellors may authorize the jury commission to obtain names for jury venires from such source and by such method.

T.C.A. §39-2-202. First-degree murder. (a) Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.

T.C.A. §39-2-203. (i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

(1) The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older;

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind;

(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;

T.C.A. §39-2-205. Review of death sentence. - (a) Whenever the death penalty is imposed for murder in the first degree and upon the judgment becoming final in the trial court, the defendant shall have the right of direct appeal from the trial court to the Tennessee Supreme Court, which shall have exclusive appellate jurisdiction, provided that the sentence of death shall be automatically reviewed by the Tennessee Supreme Court and said sentence review shall be consolidated for consideration with the direct appeal, if prayed for. If the defendant has been convicted of first-degree murder and sentenced to death and appeals that conviction and sentence, the record as to guilt and sentence shall be expeditiously filed with the Tennessee Supreme Court within the time limit provisions of Tennessee Rules of Procedure Rules 24 and 25. If the defendant has been convicted of first-degree murder, then the trial judge shall certify, within ninety (90) days after the judgment has become final, the record relating to punishment and the same shall be transmitted by the clerk of the trial court to the Tennessee Supreme Court. If the defendant has been convicted of other crimes at the same trial wherein a death sentence is imposed, the Tennessee Supreme Court shall have authority to review by direct appeal such other crimes if appealed by the defendant with the conviction of first-degree murder and sentence of death.

(b) The appeal of the conviction of first-degree murder and the review of the sentence of death shall have priority over all other cases and shall be heard according to rules promulgated by the Tennessee Supreme Court. The Tennessee Supreme Court shall first consider any errors assigned and then the court shall review the sentence of death.

(c) In reviewing the sentence of death for murder in the first degree, the Tennessee Supreme Court shall determine whether:

(1) The sentence of death was imposed in any arbitrary fashion;

(2) The evidence supports the jury's findings of a statutory aggravating circumstances or statutory aggravating circumstances;

(3) The evidence supports the jury's finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance or circumstances so found; and

(4) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant. The Tennessee Supreme Court may promulgate rules as it deems appropriate to establish such procedures as are necessary to enable it to properly review the death sentence.

(d) In addition to its other authority regarding correction of errors, the Tennessee Supreme Court, in reviewing the death sentence for murder in the first degree, is authorized to:

(1) Affirm the sentence of death; or

(2) Modify the punishment to life imprisonment.

(e) In the event that any provision of §§39-2-202 -- 39-2-204, 39-2-206 or this section or the application thereof to any individual or circumstances is held to be invalid or unconstitutional by the Tennessee Supreme Court or a federal

court, so as permanently to preclude a sentence of death as to that individual, the court having jurisdiction over such individual previously sentenced to death shall cause such individual to be brought before the proper court which shall sentence such person to imprisonment for life.

T.C.A. §40-18-111. General verdict of guilty. A general verdict of guilty will be sustained if there is any one good count in the indictment sustained by proof, although the other counts may be fatally defective.

Tennessee Rules of Criminal Procedure. Rule 6. The Grand Jury. (a) Formation of the Grand Jury.

(1) Formation at a Regular Term. -- The judge of the court authorized by law to charge the grand jury and to receive the report of that body shall, on the first day of each term of court at which a grand jury is required to be impaneled, direct the names of all the qualified jurors in attendance upon the criminal courts of the county to be written on separate slips of paper and placed in a box or other suitable receptacle and drawn out by the judge in open court. The twelve qualified jurors whose names are first drawn shall, with the foreman, be the grand jury for the term and shall attend the court until dismissed by the judge or until the next term.

Tennessee Constitution, Article 1. Section 10. Double jeopardy prohibited. that no person shall, for the same offence, be twice put in jeopardy of life or limb.